Filed 1/31/19 P. v. Ravaglia CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADAM SCOTT RAVAGLIA, Defendant and Appellant.	A149657 (Alameda County Super. Ct. No. H55665)

Defendant Adam Ravaglia appeals his conviction for two counts of insurance fraud, one in violation of Penal Code[1] section 550, subdivision (a)(1), and the other in violation of section 550, subdivision (b)(2). Ravaglia raises four issues: (1) the trial court erred in discharging a juror for good cause during deliberations; (2) the trial court abused its discretion in denying substitute defense counsel's request for a continuance; (3) the trial court prejudicially erred in admitting evidence under the business record exception to the hearsay rule; and (4) the cumulative impact of these errors requires reversal. The judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On October 29, 2012, Ravaglia's car hit Gavin Farrington's car from behind on the I-880, causing Farrington to collide with the car in front of him driven by Hai Zhao. Farrington testified the accident occurred around 7:15 p.m. while he was on the way to a 7:30 p.m. meeting. Zhao testified the accident occurred "just past 7 p.m." Ravaglia

[1] Further statutory references are to the Penal Code unless otherwise indicated.

showed Farrington proof of insurance from Geico Insurance Company indicating his insurance expired on September 17, 2012. Farrington and Zhao used their cell phones to take photos of the damage caused by the accident. Time stamps on the photos taken by Farrington and Zhao show they were taken as early as 7:16 p.m.

Michael Wolfe is an insurance counselor for Geico who helps customers with their policies, including taking payment. On October 29, 2012, around 7:19 p.m., Wolfe was at work and received a phone call from Ravaglia who wanted to pay for his insurance. At 7:26 p.m., Wolfe processed the payment and "reissued" the policy, which became effective at the moment of payment. Wolfe testified about the difference between "reinstating" and "reissuing" a policy: reinstating it means there was no gap in coverage, while reissuing it means there was a gap. Wolfe testified he "reissued" Ravaglia's policy because Geico had cancelled Ravaglia's coverage effective September 17, 2012 due to nonpayment. Wolfe further testified he never represented to Ravaglia the policy he bought was retroactive in any way. Wolfe's log of his phone call with Ravaglia did not indicate Ravaglia told him he had been involved in an accident, something Wolfe would have noted.

Rita Ortez, a liability claims examiner for Geico at the time of the accident, investigated an insurance claim Ravaglia submitted through Geico's website on November 1, 2012. The online claim reported the date and time of the accident was October 30, 2012 at 8:00 p.m. During Ortez's investigation, she discovered Ravaglia's insurance had been cancelled on October 5, 2012, and he paid to have his coverage reissued on and effective October 29, 2012 at 7:26 p.m. Ortez testified about various notes made in Ravaglia's claim file during the course of Geico's investigation into his claim. According to these notes, Ravaglia admitted the accident occurred on October 29, not October 30, but Ravaglia repeatedly represented he reissued or reinstated his policy about half an hour before the collision. The notes also showed that Geico employees explained to Ravaglia his reissued insurance coverage began once Geico received his payment. Nowhere in the claim file was there any indication that Ravaglia ever told anyone at Geico he believed he had retroactive coverage. Ortez, moreover, testified that

Geico does not issue retroactive coverage. On November 23, 2012, Ortez informed Ravaglia that Geico denied his claim because it determined the accident occurred before his insurance reissued.

Alan Yin, a special investigator with Geico since 2010, was assigned to Ravaglia's claim. His investigation revealed Geico cancelled Ravaglia's insurance policy effective September 17, 2012 due to nonpayment and after a ten-day notice of cancellation had been sent giving Ravaglia until October 5, 2012 to make payment. Yin spoke to both Farrington and Zhao, reviewed the photos taken by them, and noted the photos were time stamped as early as 7:16 p.m. on October 29, 2012. Ravaglia declined a personal interview with Yin, stating his prior telephone statement should suffice and he already received a letter denying his claim. Yin listened to a recording of Ravaglia's conversation with Ortez, and noted Ravaglia told Ortez he purchased his policy 30 to 40 minutes before his accident. Based on his investigation, Yin concluded that because the accident occurred at 7:16 p.m. or earlier on October 29, 2012, it was not covered by the policy which reissued at 7:26 p.m. that same day. Yin recommended that Geico deny Ravaglia's claim on the basis of fraud and misrepresentation.

DISCUSSION

A. The trial court's decision to excuse Juror 6 for failure to deliberate is supported by the record as a demonstrable reality.

Ravaglia contends the trial court erred in dismissing a sitting juror, Juror 6, for failing to deliberate and for concealment during voir dire because the evidence did not support either ground for dismissal.

1. Background

Jury deliberations in the case began on November 5, 2014, a Wednesday, at about 11:55 a.m. After about 90 minutes of deliberations, the jury submitted its first note to the trial court signed by the foreperson, Juror 1. The note stated: "We have a Question. We have voted on both counts. However, there is no way we can change one Juror opinion. So, we're hung Jury. The Juror says—he doesn't need any evidence, or any more [illegible word]. He is making a personal decision. What we do?" (*Sic.*) The trial court

responded by telling the jury it had only been deliberating for a short time, and to continue deliberating and to read instruction 3550.[2]

About 11 minutes after the trial court directed the bailiff to read its response to the jury's note in the jury room, the jury submitted a second note to the court, again signed by Juror 1. The note stated: "We have finished deliberating. [¶] One Juror is not interested in deliberating based on evidence or facts. That Juror has made-up decision based on his/her personal belief. [¶] We are at Impass." (*Sic.*) The trial court responded by questioning Juror 1 in the presence of the prosecutor and defense counsel. Juror 1 said within the first 10 to 15 minutes of deliberations Juror 6 "got up and said, I don't care, this is my word. I'm not interested in listening in anything. We asked, every juror, he said I don't care, I don't give a damn. This is my personal thing. This is my word and done." (*Sic*.) Juror 1 explained the first 10 to 15 minutes of deliberations were taken up by the jury reading the counts and instructions, which took time because there was some confusion about the counts, and then the jury took an anonymous vote. Because the anonymous vote was not unanimous, Juror 1 prompted the other jurors to discuss the case, "whichever side." After some of the jurors discussed some of the evidence, "[J]uror [6], got up and said, I'm not interested. I don't care. Whatever it is, . . . I'm not going to change my vote." (*Sic.*) Juror 1 indicated he gave other jurors the opportunity to try to talk to Juror 6 before he sent the court the first note.

Juror 1 said the same thing happened after the trial court responded to the first note and the jury went back to deliberating: "Second time we did the same thing and that

---

[2] The CALCRIM No. 3550 instruction given here states, in relevant part: "It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you. [¶] Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion."

person said I'm not interested. You guys do whatever." The trial court then questioned Juror 6 and the following exchange occurred:

"THE COURT: Apparently during the deliberations there have been some problems back there. Can you give me your version of what's kind of transpired or what your feelings are?

"JUROR NO. 6: What do you mean? Concerning what?

"THE COURT: The deliberations.

"JUROR NO. 6: I just feel strongly in my verdict, that's all. I feel that whatever they say—I mean, they're all trying to convince me to see their way. I'm not going—I'm going to stick with what I believe.

"THE COURT: Okay. Have you discussed the case with the other jurors?

"JUROR NO. 6: Yeah. We discussed . . . our point of views and that was basically it. I don't know what else I'm supposed to be trying to work out.

"THE COURT: Your feeling is you don't want to deliberate anymore, you're not interested in looking at the evidence or anything else?

"JUROR NO. 6: Well, I felt—everything was already presented to me. I feel strongly in my belief. Everything was presented and there's nothing else I could actually look at that's going to make me feel . . . any other way. . . ."

Immediately after this exchange, around 3:55 p.m., the trial court indicated the jury might just need a break and excused the jury until the next day. Then the court noted the prosecutor requested the removal of Juror 6 for not deliberating. The court indicated, tentatively, it was not inclined to remove Juror 6, and stated before it would do that, it would like to review relevant case law and probably talk to the other jurors. Deputy Public Defender Benjamin Chiang expressed concern that the fact this happened within the first 10 to 15 minutes of deliberations indicated the other 11 jurors had also made up

their minds without deliberating.[3] Chiang asserted "any singling out of Juror Number 6 would be inappropriate and prejudicial."

On November 6, 2014, deliberations began at 9:30 a.m. Outside the presence of the jury, the court discussed a records check the prosecutor did concerning Juror 6. The prosecutor discovered, contrary to his responses during voir dire, that Juror 6 had been arrested for a robbery in Merced in 1988. The court questioned Juror 6 about this briefly, as follows:

"THE COURT: . . . [¶] Do you remember some incident with the Merced Police Department?

"JUROR NO. 6: Vaguely, yes.

"THE COURT: What happened and why didn't you tell me about it during voir dire?

"JUROR NO. 6: Okay. Well, I was in the Navy and I think I was at a club and there was a situation . . . with a woman who I was driving and she tried to steal some money out of my car and she had tried to say that I was trying to buy drugs from her. That was basically it.

"THE COURT: Did you actually go into custody on that, Juror 6?

"JUROR NO. 6: No

"THE COURT: And that's why you chose not to disclose it?

"JUROR NO. 6: Yes

"THE COURT: My final question is . . . [h]ave you actually deliberated, followed the law, and tried to do the right thing in this case?

"JUROR NO. 6: Yes, I have."

After this line of questioning, Juror 6 returned to the jury room and the prosecutor asked the court to remove Juror 6 for not deliberating and for concealing his criminal

---

[3] Chiang appears to have assumed Juror 6 was a lone holdout for an acquittal, but there is nothing in the record stating what sides any of the jurors were on at this point in time. When questioning Juror 1 about whether the jury had taken a vote, the trial court specifically told Juror 1 not to reveal what the numbers were or which side they favored.

record. Deputy Public Defender Jody Nunez, appearing in place of Chiang, objected to the inquiry of Juror 6 and asked for a continuance so Chiang could be present. The court took a recess at 9:55 a.m. Then, around 10:20 a.m., the court received a third note from the jury signed by Juror 1 that said: "We need your help. We are at the same place as we were yesterday. We did deliberation today. We all 12 Jurors feels that there is no further need of deliberation. We're at Impass. Juror #6 is still not listening and open to make decision based on facts & evidence. We all 12 Jurors have our votes." (*Sic.*)

Around 10:30 a.m., the court announced to the parties its decision to dismiss Juror 6 for failing to deliberate and for concealing his prior arrest during voir dire. Nunez objected to the dismissal on both grounds. Nunez also reiterated her concern that Chiang was not present and asked the court to suspend deliberations until Wednesday. Around 10:47 a.m., the court called Juror 6 into the courtroom, dismissed him, and replaced him with an alternate juror. After about 33 minutes of deliberating, the jury reached its verdict.

2. Analysis

" 'The trial court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty. (§ 1089.) "When a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*. [Citations.]" [Citation.] . . . "Grounds for investigation or discharge of a juror may be established by his [or her] statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." ' " (*People v. Homick* (2012) 55 Cal.4th 816, 898.) " 'A juror who actually refuses to deliberate is subject to discharge by the court [citation] . . . .' [Citations.] 'A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view,

refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.' " (*People v. Wilson* (2008) 43 Cal.4th 1, 25–26 (*Wilson*).)

"The *manner* in which [a] trial court conduct[s] its inquiry is subject to review for abuse of discretion under the typical standard." (*People v. Fuiava* (2012) 53 Cal.4th 622, 712 (*Fuiava*).) That said, the decision to discharge a sitting juror is subject to review under the demonstrable reality standard, a more comprehensive and less deferential review than the typical abuse of discretion standard. (*Ibid.*)

"The typical abuse of discretion standard involves an analysis of whether the trial court's decision is supported by ' "substantial evidence," ' and 'has been characterized as a "deferential" standard.' [Citation.] 'A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied.' " (*Fuiava, supra*, 53 Cal.4th at p. 711.) In contrast, the demonstrable reality test " 'requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that [good cause for removing the juror is] established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.' " (*People v. Armstrong* (2016) 1 Cal.5th 432, 450–451 (*Armstrong*).)

Here, Ravaglia argues the evidence did not support the trial court's finding that Juror 6 refused to deliberate. We disagree. The trial court explained on the record that its decision was based on Juror 1's notes and statements regarding Juror 6, which we describe below.

In summary, Juror 1 said that within the first 10 to 15 minutes of deliberations, Juror 6 "got up and said, I don't care, this is my word. I'm not interested in listening in

anything. We asked, every juror, he said I don't care, I don't give a damn. This is my personal thing. This is my word and done." Juror 1 also explained the first 10 to 15 minutes of deliberations were taken up by the jury reading and clearing up confusion about the counts and instructions, and then taking an anonymous vote. Because the anonymous vote was not unanimous, Juror 1 prompted the other jurors to discuss the case, "whichever side." After some of the jurors discussed some of the evidence, "[J]uror [6], got up and said, I'm not interested. I don't care. Whatever it is, . . . I'm not going to change my vote." (*Sic.*) Juror 1 indicated he gave other jurors the opportunity to try to talk to Juror 6 before he sent the court the first note, which the court received about 90 minutes after deliberations began. Again, that first note stated, in relevant part: "The Juror says—he doesn't need any evidence, or any more [unintelligible word]. He is making a personal decision." The trial court responded to the first note by instructing the jury to keep deliberating and to read CALCRIM No. 3550, but about 11 minutes after the trial court directed the bailiff to read its response to the jury, the jury sent out the second note, stating, in part: "One Juror is not interested in deliberating based on evidence or facts. That Juror has made-up [*sic*] decision based on his/her personal belief." Juror 1 explained after receiving the court's response to the first note, the same problems with Juror 6 persisted. The trial court responded to this second note by recessing early and until the next day to "let the situation cool off a little bit," but less than one hour after deliberations began the next day, the jury sent out the third note that stated, in part: "We are at the same place as we were yesterday. . . . Juror #6 is still not listening and open to make decision [*sic*] based on facts and evidence."

Applying the demonstrable reality standard, we are confident that the evidence relied upon by the trial court manifestly supports the trial court's conclusion that Juror 6 had a fixed conclusion at the beginning of deliberations and refused to engage in the deliberative process. (*Wilson*, *supra*, 43 Cal.4th at p. 27.) In reaching this conclusion, we reject Ravaglia's argument that the evidence does not support that Juror 6 refused to deliberate as a demonstrable reality because Juror 6 told the court on November 5 and 6 that he had deliberated. Ravaglia essentially argues the trial court, which heard from

Juror 6 before making its decision, should have believed Juror 6 when he denied he had refused to deliberate. This argument misperceives the nature of our review of the trial court's decision. The California Supreme Court has repeatedly advised that even under the demonstrable reality standard, a reviewing court does not reweigh evidence. (*Armstrong*, *supra*, 1 Cal.5th at p. 451; *Wilson*, *supra*, 43 Cal.4th at p. 26.) It is for the trial court to "weigh the credibility of those testifying and draw upon its own observations of the jurors throughout the proceedings," and a reviewing court must "defer to factual determinations based on these assessments." (*People v. Lomax* (2010) 49 Cal.4th 530, 590 (*Lomax*).)

In this case, on November 5, the trial court asked Juror 6 for his version of what transpired during deliberations, and Juror 6 told the court: "we discussed . . . our point of views *and that was basically it*" and "[e]verything was presented and there's nothing else I could actually look at that's going to make me feel . . . any other way." (Italics added.) The trial court, making credibility determinations and weighing the evidence as it was entitled to do, could reasonably conclude that Juror 6 maintained a fixed view from the outset. Although Juror 6 responded affirmatively on November 6 when the trial court asked the following leading question, "Have you actually deliberated, followed the law, and tried to do the right thing in this case?", the trial court could reasonably conclude this was a conclusory and self-serving response. (See *People v. Diaz* (1984) 152 Cal.App.3d 926, 937.) Ultimately, the trial court did not credit Juror 6's statements that he deliberated, and we will not, as Ravaglia urges, reweigh the evidence before the trial court.[4]

As for Ravaglia's contention that Juror 1's account shows Juror 6 in fact deliberated because Juror 1 indicated Juror 6 did not make the problematic statements until 10 or 15 minutes into deliberations, this is unpersuasive. As discussed, Juror 1 explained the first 10 to 15 minutes of deliberations were taken up by the jury reading

[4] Notably, a juror need not admit he or she failed to deliberate before the trial court can find that is what occurred. (See *Lomax*, *supra*, 49 Cal.4th at p. 590 ["[A] juror need not admit a bias for the court to find that it exists"].)

and clearing up confusion about the counts and instructions, then taking an anonymous vote. This evidence, viewed in light of the entire record, manifestly supports the trial court's conclusion that Juror 6 did not deliberate for any meaningful or reasonable period of time. (*Armstrong*, *supra*, 1 Cal.5th at pp. 450–451; cf. *People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*) ["A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views"].)

Ravaglia's authorities are factually distinguishable and do not compel a different result. In *People v. Bowers* (2001) 87 Cal.App.4th 722, jury deliberations had occurred on at least three days before the foreperson expressed concern that one juror, Juror 4, was not deliberating. (87 Cal.App.4th at p. 725.) At a hearing on the matter, many jurors told the court that Juror 4 had deliberated and had expressed a position based on his disbelief of specific testimony. (*Id.* at p. 732.) Juror 4 had also participated in the request for the readback of testimony. (*Id.* at p. 735.) On those facts, which bear no resemblance to those presented here, the appellate court held the trial court erred in discharging Juror 4 for a perceived failure to deliberate. (*Ibid*.) Ravaglia seizes upon language in *Bowers* where the court—after noting there was conflicting testimony concerning Juror 4's "active participation in the jury discussions"—stated that "formal discussion is not necessarily required to reach a decision or conclusion by deliberation." (*Id.* at p. 733.) Here, however, there is no similar evidence that Juror 6 both actively and passively participated in deliberations as the contested juror in *Bowers* did.

The facts of *Armstrong*, *supra*, 1 Cal.5th 432 are likewise inapposite. Unlike the situation here, there was no suggestion in *Armstrong* that the juror at issue, Juror 5, entered deliberations with a fixed conclusion about the case. To the contrary, the foreman testified that Juror 5 was "articulate" and that she engaged with all the jurors at the outset of deliberations. (1 Cal.5th at p. 446.) Likewise, another juror indicated Juror 5 had been participating. (*Id.* at p. 447.) It was only "after a good start to deliberations" that Juror 5 " 'seemed a little less open minded' " and " 'just kind of sat there' " and

" 'really didn't even participate.' " (*Id.* at pp. 447, 453.) On appeal, the California Supreme Court concluded the trial court erred in discharging Juror 5. The court stated the fact "[t]hat Juror No. 5 was not willing to engage in further discussion, by itself, does not show as a demonstrable reality that she was failing to deliberate." (*Id.* at p. 453.) Although the foreperson reported that some of the jurors were frustrated with Juror 5, it appeared the source of that frustration was Juror 5's disagreement with their view of the prosecution's evidence. (*Ibid.*) In contrast, the record here reflects that Juror 6 had already made up his mind at the start of deliberations and at no time was interested in considering other points of view.

Ravaglia next contends the trial court erred by crediting Juror 1 over Juror 6 without questioning any other jurors about what transpired. This is a challenge to the manner of the court's inquiry into the alleged misconduct, which we review for abuse of discretion. (*Fuiava*, *supra*, 53 Cal.4th at p. 712.) However, this claim has been forfeited because neither defense counsel Chiang nor Nunez ever asked the court to talk to the other jurors. (See *People v. Holloway* (2004) 33 Cal.4th 96, 126–127 [failure to "seek a more extensive or broader inquiry" forfeits right to object on appeal].) Instead, after the trial court indicated it was inclined to talk to the other jurors before deciding whether to remove Juror 6, and after the prosecutor suggested several questions the court could ask the other jurors, defense counsel Chiang indicated he thought "any singling out of Juror Number 6 would be inappropriate and prejudicial." (See *People v. Burgener* (1986) 41 Cal.3d 505, 521 [defendant cannot object to trial court's inquiry and later seek reversal for failure to conduct that inquiry], overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753 & 756.)

Even if we assume this claim is not forfeited, we conclude the trial court did not abuse its discretion in the manner in which it conducted its inquiry. A trial court is permitted, but not required, to conduct further inquiry if there is some ambiguity surrounding the issue of whether a juror should be discharged. (*Fuiava*, *supra*, 53 Cal.4th at p. 714.) However, case law cautions that "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as

possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (*Cleveland*, *supra*, 25 Cal.4th at p. 485.) In this case, as discussed, the court had three notes from the foreperson, knew of the timing of the notes, and heard directly from the foreperson and from Juror 6 about Juror 6's alleged refusal to deliberate. Again, the court was entitled to make credibility determinations and weigh the evidence, and in so doing reasonably viewed all the evidence as establishing Juror 6's refusal to deliberate, obviating any need for further investigation. (See, e.g., *Fuiava*, *supra*, 53 Cal.4th at pp. 704–710 & 714–715 [finding no error in the dismissal of a juror based on one discussion with that juror where he/she admitted being unable to follow the instructions due to bias and rejecting the argument the court abused its discretion by not further questioning that juror or any other jurors].)

Ravaglia relies on *People v. Barber* (2002) 102 Cal.App.4th 145 to argue the trial court was obliged to interview other jurors before it could credit Juror 1's account. That reliance is misplaced. *Barber* explains that "[w]hen [a] court is informed a juror is not deliberating, it may make ' "whatever inquiry is reasonably necessary to determine" ' if there is misconduct." (*Id*. at p. 151.) In *Barber*, a trial court selectively questioned five jurors who claimed another juror was not deliberating, while not questioning six other jurors who claimed the juror was deliberating. In disapproving the trial court's inquiry, the *Barber* court stated: "The hearing was fundamentally unfair because the court restricted the evidence primarily to witnesses supporting the prosecution's position. Proceedings that exclude relevant defense witnesses are constitutionally inadequate. [Citations.] . . . The court thus obtained an incomplete version of Juror No. 5's participation from those most likely to harbor resentment against him." (*Id.* at pp. 151–152.) In contrast, the record here contains no suggestion that other jurors sided with Juror 6, and the trial court did not conduct a one-sided inquiry but instead questioned both Juror 1 and Juror 6.

Because we find the trial court properly removed Juror 6 for refusing to deliberate, we need not address the court's other ground for removing Juror 6; i.e., for allegedly lying during voir dire. (See *People v. Montes* (2014) 58 Cal.4th 809, 871–873 [affirming

removal of a juror on one ground and finding it unnecessary to review trial court's alternative basis for removal]; *People v. Johnson* (1993) 6 Cal.4th 1, 21–22 [trial court's removal of a juror could "be sustained solely on the basis of its finding that [the juror] had fallen asleep during trial," regardless whether the trial court properly discharged the juror on the alternative ground of providing untruthful or incomplete responses to the jury questionnaire].)

B. The trial court did not abuse its discretion in denying the defense's request for a continuance.

Nunez, appearing in Chiang's stead on Thursday, November 6, asked for the suspension of deliberations and a continuance of the ruling on the prosecutor's motion to discharge Juror 6 until Chiang could be present the following Wednesday. The trial court denied the motion. Ravaglia now argues the court abused its discretion in denying the requested continuance because Chiang—who observed the speech and demeanor of Juror 6 both during voir dire and the court's examination the day before—could have made a "potentially material argument" on the issue of his discharge. Ravaglia claims the error violated his due process rights by unreasonably denying him the right to be represented by counsel with knowledge of his case. We reject this for the reasons set out below.

1. Background

On November 5, 2014, before proceedings were adjourned for the day, Chiang informed the trial court he would not be present the following day. The court directed him to have one attorney from his office appear in his stead. The record indicates the court and parties knew prior to the commencement of trial that Chiang had a pre-scheduled vacation. On November 6, Nunez appeared in place of Chiang. Before calling Juror 6 into the courtroom to discuss his alleged concealment of his Merced arrest during voir dire, the prosecutor asked if Ravaglia could be requested to verbally agree on the record to Nunez standing in for Chiang. Nunez said she did not think that was necessary but asked Ravaglia if he understood that Chiang was unavailable and that she was sitting in for him, and Ravaglia said he understood. After this exchange, the court questioned Juror 6 about his alleged concealment of his Merced arrest and failure to deliberate, then

considered argument concerning the motion to discharge. Nunez objected to the inquiry of Juror 6 and asked the court to continue the hearing until the following Wednesday, when Chiang would be available. The prosecutor responded to the continuance request by observing Nunez was a very experienced and senior public defender, and noting the juror misconduct issue was not based on anything that occurred during trial. About half an hour later, the court announced its decision to remove Juror 6 for concealment and failure to deliberate. Nunez substantively objected to the decision and again asked the court to suspend deliberations until Wednesday, to await Chiang's return. Nunez noted the court was closed on Fridays, and the following Tuesday was a holiday. The court then dismissed Juror 6.

2. Analysis

"Continuances shall be granted only upon a showing of good cause. . . . [T]he convenience of the parties . . . is [not] in and of itself good cause." (§ 1050, subd. (e).) "[T]he court has broad discretion to grant or deny the motion for continuance." (*People v. Grant* (1988) 45 Cal.3d 829, 844.) "The granting or denial of a motion for a continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Laursen* (1972) 8 Cal.3d 192, 204; see *People v. Beeler* (1995) 9 Cal.4th 953, 1003 (*Beeler*) ["An important factor for a trial court to consider is whether a continuance would be useful"].) " 'The burden is on [the defendant] to establish an abuse of judicial discretion . . . .' " (*Beeler*, *supra*, 9 Cal.4th at p. 1003.)

Here, Ravaglia fails to demonstrate, and our examination of the record fails to disclose, an abuse of discretion. Chiang was present on November 5 when the court questioned Juror 6 about his alleged failure to deliberate. Knowing that he would be gone the following day and that another attorney from his office would appear in his stead, Chiang put on the record his thoughts and concerns regarding what had transpired.

Chiang, however, never asked for a continuance. Nunez was present the next day when the court questioned Juror 6 about his alleged concealment of his arrest and whether he had deliberated, and she objected at length to the dismissal of Juror 6 on grounds of concealment and failure to deliberate. When Nunez asked for a continuance to the following Wednesday to await Chiang's return, she did not specify what the continuance would achieve other than Chiang's presence with his attendant familiarity with the earlier proceedings. On appeal, Ravaglia does essentially the same. He suggests Chiang's presence could have been useful because he could have commented on Juror 6's demeanor during voir dire and the November 5 examination, but the Court itself observed Juror 6 during voir dire and on November 5, and heard from Chiang on November 5. Further, the record does not suggest Juror 6's demeanor during voir dire was particularly relevant to the issue whether Juror 6 refused to deliberate. Notably, Chiang appeared at sentencing and put on the record objections he had to Juror 6's removal. Chiang did not argue about Juror 6's demeanor in relation to the issue of whether he failed to deliberate. Chiang mentioned Juror 6's demeanor only when rebutting the prosecutor's argument that Juror 6's demeanor changed between voir dire and being questioned for refusing to deliberate, from timid and demure to bold and outspoken, evidencing deliberate concealment of his arrest.

Ultimately, any perceived benefit of Chiang's presence at the November 6 hearing was speculative. At the same time, the trial court had to consider the burden on the jurors and the court, the People's right to a speedy trial, and the public policy interest that "all proceedings in criminal cases shall be set for trial and heard and *determined* at the earliest possible time." (§ 1050, subd. (a), italics added; Cal. Const., art. I, § 29; see *People v. Mendoza* (1992) 8 Cal.App.4th 504, 515.) Given this record, we find no abuse of discretion.

As a final note on this issue, to the extent Ravaglia relies on *People v. Crovedi* (1966) 65 Cal.2d 199 (*Crovedi*) and *Harris v. Superior Court* (1977) 19 Cal.3d 786 (*Harris*) in support of his contention, those cases are inapposite. In *Crovedi*, the defendant's retained counsel suffered a heart attack mid-trial and could not return to the

courtroom for over a month. (*Crovedi*, *supra*, 65 Cal.2d at pp. 201–202.) The defendant sought a continuance until his retained counsel could return, but the trial court denied the request and appointed retained counsel's law partner, giving him a week to prepare for trial. (*Id.* at pp. 202–203.) After that week, appointed counsel objected to the appointment and stated he was unprepared, and the defendant objected and explained he made diligent efforts to find another attorney, but the attorney he consulted represented a minimum of four weeks was needed to prepare for the case. (*Id.* at p. 203.) The court again denied the requested continuance and trial proceeded. (*Ibid.*) The California Supreme Court reversed, finding "the circumstances of this case did not justify the trial court's refusal to permit defendant to be represented by counsel of his own choice, and that . . . refusal constituted a denial of due process of law." (*Id.* at pp. 208–209.)

In *Harris*, Jordan and Weinglass were appointed as attorneys for the defendants in the municipal court, and the defendants sought to have them appointed in superior court after an indictment was filed and the municipal court case was dismissed. (*Harris, supra*, 19 Cal.3d at pp. 789–790.) The superior court refused and appointed two other attorneys, despite those attorneys voicing support of the defendants' request for Jordan and Weinglass, and despite a showing that Jordan and Weinglass already understood the factual and legal issues involved in the case having represented the defendants in related prosecutions. (*Id.* at pp. 793–794.) The California Supreme Court found that, under the circumstances, the superior court abused its discretion in refusing to appoint Jordan and Weinglass. (*Id.* at pp. 797–798.)

The facts of *Crovedi* and *Harris* plainly bear no resemblance to the facts here.

C. The trial court did not commit prejudicial error in admitting evidence under the business record exception to the hearsay rule.

Next, Ravaglia argues the court prejudicially erred in admitting People's Exhibits 5, and 14 through 17, under the business records exception to the hearsay rule. We disagree.

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

[¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271.)

" 'The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.' " (*People v. Zavala* (2013) 216 Cal.App.4th 242, 246.) "A trial judge is vested with wide discretion in determining whether a proper foundation has been laid for admission of business records under the business records exception. [Citation.] 'Where the trial court has determined that the foundation laid was sufficient to support the introduction of evidence under the business records exception, and the record reasonably supports this determination, its conclusion is binding on the appellate court.' [Citation.] Determining whether a proper foundation has been laid for the admission of business records under Evidence Code section 1271 is within the trial court's discretion and 'will not be disturbed on appeal absent a showing of abuse.' " (*Id.* at pp. 245–246.)

Here, the trial court properly found People's Exhibit 5—a hard copy of the online insurance claim Ravaglia allegedly submitted to Geico—was admissible as a business record based on the testimony of Rita Ortez.[5] At the time of her testimony, Ortez was a supervisor in Geico's subrogation department and, at the time the claim was submitted in late 2012, she was a liability claims examiner who investigated liability disputes for

[5] We disagree with the People that this issue was waived. During trial, defense counsel objected to People's Exhibit No. 5 on grounds it was hearsay, called for speculation, and lacked foundation, but the court overruled the objection subject to cross-examination. During cross-examination, defense counsel moved to strike Ortez's testimony about the document on the grounds of lack of foundation. In doing so, Ravaglia preserved the evidentiary challenge for review. While defense counsel did not object to the ultimate admission of the document towards the close of evidence, such an objection would have been futile in light of the trial court's prior rulings. "Defense counsel is not required to make a futile objection to preserve an issue for appeal." (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 356.)

Geico. Ortiz testified about how online claims are made, and how the document at issue was generated and kept in the ordinary course of business. She also testified that it accurately reflected the information input by the user, and that it is a type of document relied upon by Geico. This particular document was generated on November 1, 2012, and it contained Ravaglia's name and other identifying information, as well as information about the accident.

Ravaglia claims the document could not qualify as a business record because Ortez could not testify who exactly was the source of the information. This, however, was not necessary for the court to find the document qualified as a business record. (See, e.g., *People v. Williams* (1973) 36 Cal.App.3d 262, 275.) Further, as the People note, there was ample other evidence supporting the conclusion that Ravaglia made the initial claim. As such, it is not reasonably probable Ravaglia would have obtained a more favorable result absent its admission. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

People's Exhibits 14 through 17 consisted of the following documents: People's Exhibits 14 and 15 were documents showing payment history on Ravaglia's account; People's Exhibit 16 consisted of a document sent to Ravaglia to give notice his policy would be cancelled on October 5, 2012 due to nonpayment and a post office receipt; and People's Exhibit 17 was a document informing Ravaglia that Geico cancelled his policy and that he owed a balance.

Whether or not the prosecution laid a sufficient foundation to qualify these documents as business records, Ravaglia fails to establish prejudice. (*Watson*, *supra*, 46 Cal.2d at p. 836.) These documents were shown to Wolfe—who took Ravaglia's payment to reissue his insurance policy on October 29, 2012—apparently to show that Ravaglia knew his insurance coverage lapsed in September 2012. However, the record contained ample evidence of the same through the testimony of Rita Ortez and Alan Yin. Further, relying on People's Exhibit 12 and 13, to which the defense did not object, Wolfe testified that Geico cancelled coverage effective September 17, 2012 because Ravaglia failed to make insurance payments. Wolfe explained that Ravaglia called Geico

to make a payment on October 29, 2012 at 7:19 p.m., and Wolfe processed that payment and reissued the policy on October 29, 2012 at 7:26 p.m. Moreover, Gavin Farrington testified, at the scene of the accident, Ravaglia showed him proof of insurance from Geico indicating his insurance expired on September 17, 2012. Given the record, it is not reasonably probable Ravaglia would have obtained a more favorable result absent admission of the contested exhibits.

D. Ravaglia's claim of cumulative error fails.

Because we reject Ravaglia's preceding claims, his final claim, that cumulative error compels reversal of his convictions, is without merit.

DISPOSITION

The judgment is affirmed.

_____
Fujisaki, J.

We concur:

_____
Siggins, P.J.

_____
Jenkins, J.

A149657